IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA Plaintiff, v. DTE ENERGY COMPANY, and DETROIT EDISON COMPANY Defendants.	Civil Action No. 2:10-cv-13101-BAF-RSW Judge Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Given the stakes and the factual disputes presented by the preliminary injunction motion, it is perfectly reasonable for the United States to take depositions of five of the nine witnesses DTE may present at the preliminary injunction hearing.

DTE has told the Court it will install top pollution controls at Monroe Unit 2 by 2014. This is exactly what DTE was required to do in June when it completed the modifications at issue at Monroe Unit 2. The critical question before this Court is whether to require DTE to reduce emissions across its fleet to offset the unpermitted, illegal emissions from Monroe Unit 2 for the four years between June 2010 and 2014. While the Court has already limited DTE to Monroe 2's pre-project pollution levels, that order only prevents DTE from increasing pollution. It does not give surrounding communities the benefit of the dramatic pollution reduction required by New Source Review. Based on a peer-reviewed model and testimony from the world's leading scholar on the health effects of air pollution, DTE's illegal pollution is resulting, and will result, in approximately 90 deaths per year until Monroe Unit 2 is fully-controlled. The Parties

and this Court are proceeding to a preliminary injunction hearing where "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978); *see also United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) ("We therefore see little consequential importance to the concept of the status quo"); Doc. # 15 (DTE Brief in Support of Motion to Strike) at 17 ("Detroit Edison does not dispute the Court's authority under Sixth Circuit law to alter the *status quo* when considering a motion for a preliminary injunction."). The question before the Court is a critical one, and the Parties should be allowed to use the time remaining before the hearing to explore the testimony that may be offered.

Given the stark importance of the issue before the Court, it is entirely reasonable for limited discovery to be taken before the preliminary injunction hearing. Contrary to DTE's motion, the limited depositions that the United States seeks are fully consistent with the rules of civil procedure and far from burdensome.[1] Given the time remaining before the preliminary injunction hearing, the United States respectfully requests that the Court deny DTE's motion with dispatch so that the Parties may proceed with the five depositions noticed by the United States (and whatever reciprocal depositions DTE decides it needs to take).

ARGUMENT

The limited depositions sought by the United States are important to ensuring a fair, efficient, and fully-informed preliminary injunction hearing, and nothing in the Federal Rules of Civil Procedure or the case law precludes depositions in these circumstances.

[1] Unfortunately, DTE's motion will serve to delay these depositions by several weeks, thereby, ironically, increasing the burden on the Parties. Nevertheless, the United States will be prepared to proceed with the preliminary injunction hearing on January 19, 2011 as scheduled.

DTE's arguments against allowing depositions cannot withstand scrutiny. There is no rule or case law for the proposition that preliminary injunction proceedings are discovery-free zones. The only barrier to discovery is Rule 26(d)(1), which precludes discovery, in all cases, before the parties have engaged in a pre-trial conference under Rule 26(f). The United States has complied with Rule 26(d)(1): the Parties engaged in a Rule 26(f) conference more than two months ago, on September 24, 2010. Both Parties have been free to conduct discovery since that date.[2] The United States refrained from noticing depositions until the briefing on the preliminary injunction motion in order to be able to focus on deposing only those witnesses where a pre-hearing deposition was particularly necessary. While depositions may not always be appropriate for preliminary injunction cases, the importance of this case and the relatively long time[3] between the filing of the motion and the hearing make depositions reasonable here. The United States noticed the depositions on November 19 – two months before the hearing date. It is hardly unusual for parties in complex litigation to take a dozen depositions in two months.

A. Legal Standard

DTE fails to mention the standard of review a trial court uses in considering a motion for protective order. The burden to show "good cause" for such a motion is on the party seeking the protective order. *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001). The movant must show good cause by "articulat[ing] specific facts showing clearly defined and serious injury resulting from the discovery sought and cannot rely on mere conclusory statements." *Id.* (internal quotation marks omitted).

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[2] Moreover, Rule 26(d)(1) allows for discovery upon good cause, such as preparing for a preliminary injunction hearing. Rule 26: 1993 Notes.

[3] The time between the motion and the hearing was dictated in large part by Defendants' request for 90 days to respond to the motion, based on their assertion that additional time was necessary for a fair response. Having received the extra time they said they needed, Defendants should not now be able to block the depositions sought by the United States.

B. The United States' Noticed Depositions Are Reasonable

The United States has already narrowed its request by seeking to depose just five of DTE's nine potential witnesses, in an effort to be responsive to DTE's concerns about burden. The five depositions the United States seeks are important to our preparation for the preliminary injunction hearing. First, three of the potential witnesses the United States seeks to depose (Skiles Boyd, William Rogers, and George Wolff) have never been deposed before, making a deposition necessary for effective cross examination. Second, to the extent the Court accepts DTE's declarations as testimony, a deposition is necessary to determine how accurate and defensible that testimony is. DTE's contested testimony should not be relied upon without an opportunity for cross examination informed by prior deposition. Finally, precluding depositions disproportionately harms the United States' preparation. Eight of the United States' nine potential witnesses have previously been deposed in NSR enforcement cases on the same topics they would testify concerning here, so DTE has little to lose by opposing depositions. By contrast, DTE has presented three potential witnesses who have never been previously deposed. These witnesses could be important to DTE's opposition, and the United States has the right to depose them in order to understand the basis for their testimony and to prepare effective cross examination. Without depositions, the United States would have to blindly cross-examine these witnesses at the hearing, or, worse, the court would have to take their testimony on faith. Civil discovery is intended to avoid precisely that result, which is not acceptable in a matter of this importance. *See Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902 (6th 1988) ("The purposes underlying the federal rules are to avoid surprise and the possible miscarriage of justice and to eliminate the sporting theory of justice.") (internal quotation marks omitted).

C. DTE Cannot Meet Its Burden for a Protective Order

DTE has not satisfied its burden to "articulate specific facts showing clearly defined and serious injury resulting from the" depositions the United States has noticed. *See Nix*, 11 Fed. Appx. at 500.

DTE begins by arguing that no evidentiary hearing is necessary in this matter. Were this true, the United States would certainly agree that depositions would be unnecessary. However, the Sixth Circuit has made clear that it is only "where material facts are not in dispute...[that] district courts generally need not hold an evidentiary hearing." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) (internal quotation marks omitted). Even the case DTE cites for the proposition that a hearing need not be held establishes that an evidentiary hearing must be the typical course. Judge Gadola found that a hearing could be foregone "'when the written evidence shows the lack of a right to relief so clearly that receiving further evidence would be *manifestly pointless*.'" *Big Time Worldwide Concert & Sport Club at Town Center, LLC v. Marriott Int'l, Inc.*, 236 F. Supp. 2d 791, 794 (E.D. Mich. 2003) (emphasis added) (quoting 11A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure*: *Civil 2d* § 2949 (1995)) (cited in Doc. # 66 (DTE Motion for Protective Order) (hereinafter "Def. Br") at 6). DTE does not attempt to argue that a hearing here would be "manifestly pointless" or that there are no material facts in dispute. Indeed, the fact that both Parties have submitted affidavits from nine separate witnesses indicates there are facts in dispute. An evidentiary hearing is necessary.

Given that a hearing must be held, there is nothing burdensome in the United States deposing five of DTE's nine potential witnesses. The importance of this litigation counsels toward allowing discovery, and the sophistication and resources of the Parties means that

depositions will not be burdensome. DTE's claim that the parties cannot complete or analyze testimony of the witnesses in time, Def. Br. at 8, is not credible. It is belied by the fact that DTE states in its brief that it *will* depose the United States' witnesses if depositions are allowed – surely DTE would not spend the time conducting depositions it could not analyze in time for the hearing.[4] *See* Def. Br. at 7. Moreover, DTE does not make any specific allegations of burden, as required to support a protective order, *Nix*, 11 Fed. Appx. at 500, but merely offers vague assertions, such as that depositions would "require substantial time and additional expense for all parties involved." Def. Br. at 7. These mere assertions are not sufficient to meet DTE's burden.

DTE concludes by arguing that the rules of civil procedure bar deposing expert witnesses prior to a preliminary injunction hearing because DTE *might* choose to designate those witnesses as consultants rather than testifying experts. Def. Br. at 8-10. None of the cases DTE cites deals with the issue at hand: whether an expert who has given declaration testimony and may give live testify at a preliminary injunction hearing may be deposed. If DTE decides it will no longer present a witness and his declaration in support of the company's opposition, then the United States will not seek to depose that witness to prepare for the hearing. But DTE cannot use the possibility that it *might* withdraw a witness to preclude depositions of witnesses it relies on for its opposition. DTE has elected to present these witnesses in support of its arguments against a preliminary injunction; it cannot do so and still shield them from scrutiny.

[4] DTE also states that if the Parties were to take 12 depositions, it would add to more than half of the presumptive limit on depositions in the rules of civil procedure. Def. Br. at 7-8. First, in prior NSR enforcement cases, like other complex civil litigation, the Parties have agreed to allow more discovery than would be allowed by the rules for run-of-the-mill cases. Second, the Parties have already recognized that depositions might be taken before the preliminary injunction, and that such depositions would not preclude later depositions of the same witnesses. *See* Doc. # 44, Agreement Regarding the Scope of Expert Discovery at ¶6.

CONCLUSION

This motion simply continues DTE's effort to defeat the preliminary injunction motion without engaging on the merits. Having already moved to strike the motion and stay consideration of it, the company now urges the Court not to hold any hearing or allow any depositions. Contrary to this campaign, the issue before the Court is of the utmost importance and involves material factual disputes. Getting to the bottom of those factual disputes merits allowing the limited depositions noticed by the United States. The United States respectfully requests that the Court deny Defendants' motion so that the five depositions may go ahead and the hearing may give the Court the full picture of the facts necessary to resolve the motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2010, the foregoing brief was filed electronically using the Court's ECF system and automatically served through the Court's ECF system on counsel of record.

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